Guideline Sentencing Update

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Violation of Supervised Release

Revocation

Third and Seventh Circuits disagree on whether supervised release may be reimposed after revocation when original offense occurred before law changed. Before enactment of the 1994 Crime Bill on Sept. 13, 1994, 18 U.S.C. § 3583 did not specifically allow reimposition of a term of supervised release after revocation and imprisonment. Most circuits, including the Third and Seventh, held that release could not be reimposed. The 1994 Crime Bill added new § 3583(h), which authorized reimposition of supervised release to follow imprisonment after revocation. Defendants here committed their offenses and were sentenced before Sept. 13, 1994. In 1995 both violated the terms of their supervised release, had release revoked, were sent to prison, and were given a new term of supervised release to follow incarceration.

The Seventh Circuit held that application of § 3583(h) to defendant violated the Ex Post Facto Clause of the Constitution because it could result in greater punishment than the old law. "Assume that Defendant A is convicted of a Class C felony and sentenced to a term of imprisonment followed by three years of supervised release. . . . He serves his prison time and is released under supervision. One year into his supervised release period, he violates the terms of the release. Prior to Subsection (h), because an additional term of supervised release was not permitted, the maximum penalty the court could impose was two years' imprisonment. 18 U.S.C. § 3583(b)(3). At the end of two years the government's supervision of A is extinguished. After Subsection (h), the district court, perhaps believing itself more lenient, may order A to serve two years on a combination of imprisonment and supervised release, say one year in prison and one year on supervised release. If A then violates the terms of that second supervised release six months into it, the court has the power to send him back to prison again, this time for up to one year (the two-year maximum minus the one-year term of imprisonment he has already served). Under this scenario, A's punishment totals two and a half years from the time of his initial revocation (one year in prison, six months on supervised release, and then another year in prison)—six months longer than that allowed prior to Subsection (h). And the potential exists for even greater discrepancies."

The court also had to determine if application of § 3583(h) to defendant would be retroactive, a question the court framed as "whether the punishment imposed upon Beals' revocation 'should be considered the continuing "legal consequence" of [Beals'] original crimes, or viewed instead as the independent "legal consequence" of [Beals' later] misconduct.'" Following cases that held that changes treating parole violations more severely may not be applied retroactively, the court concluded that punishment under § 3583(h) would arise from defendant's original offense. "Conduct that violates the terms of supervised release, like that of parole violations, is often not criminal. . . . Therefore, the government punishes that conduct only because of the defendant's original offense. For that reason, we must link the punishment imposed for the subsequent conduct to the original offense for ex post facto purposes. . . . Any law enacted after the original offense that increases the total amount of time he can spend in [imprisonment and post-imprisonment release] violates the Ex Post Facto Clause." The court "remanded [the case] to the district court for it to amend its revocation order by eliminating the requirement that Beals serve a second term of supervised release following his term of imprisonment."

U.S. v. Beals, 87 F.3d 854, 858–60 (7th Cir. 1996).

In the Third Circuit, the appellate court affirmed, holding that applying the new law was not an ex post facto violation because it did not impose greater punishment than the old law. "Before the enactment of subsection (h), a defendant who violated supervised release could be sentenced to imprisonment under 18 U.S.C. § 3583(e)(3) for up to the maximum term of supervised release for a given offense, without any credit for the time spent on supervised release." Defendant had committed a Class A felony and faced a maximum of five years in prison if he violated his supervised release. "Under the new subsection (h), . . . the new term of supervised release may not exceed the maximum term of supervised release authorized for the offense, minus the term of imprisonment imposed upon revocation of the original term of supervised release. Thus, under the new law, Brady could have been sentenced to a combination of imprisonment and supervised release that was no greater than five years. Accordingly, the maximum period of time that a defendant's freedom can be restrained is the same."

"The only difference is that now Brady's liberty can be restrained with a mix of imprisonment and supervised release. In either event, the legal consequences of his criminal conduct are identical, i.e., he faces the possibility

of a 5-year term of loss of freedom both before the enactment of subsection (h) and after the enactment of subsection (h). Therefore, the availability of supervised release in no way increased the amount of time that Brady was exposed to incarceration. Thus, we fail to see how subsection (h) increased the penalty for his original offense, and we find no ex post facto violation."

U.S. v. Brady, 88 F.3d 225, 228–29 (3d Cir. 1996).

See *Outline* at VII.B.1

Offense Conduct

Calculating Weight of Drugs

En banc Eleventh Circuit holds that previously harvested marijuana plants may be used when sentencing by number of plants with weight-per-plant ratio. Defendant grew marijuana in the basement of a house. When he was arrested there were 27 live plants. Law enforcement officers also found what they later determined to be the remains of 26 previously harvested marijuana plants. The district court concluded that the remains could be counted as "plants" under the "equivalency provision" of USSG §2D1.1, n.* (1993), which considered each plant to equal one kilogram of marijuana (changed in 1995 to 100 grams) for sentencing purposes when the offense involved 50 or more plants.

"The primary issue in this appeal is whether, under 21 U.S.C. § 841 and U.S.S.G. § 2D1.1, a marijuana grower who is apprehended after his marijuana crop has been harvested should be sentenced according to the number of plants involved in the offense or according to the weight of the marijuana. A panel of this court held that, under our precedents, a grower who is apprehended after harvest may not be sentenced according to the number of plants involved. *U.S. v. Shields*, 49 F.3d 707, 712–13 (11th Cir. 1995). We vacated the panel opinion and granted rehearing en banc. *U.S. v. Shields*, 65 F.3d 900 (11th Cir. 1995). We hold that a defendant who has grown and harvested marijuana plants should be sentenced according to the number of plants involved, and affirm the district court."

"By its own terms, the equivalency provision applies to 'offense[s] involving marijuana plants.' Similarly, the statute sets mandatory minimum sentences for violations of §841(a) 'involving' a specified number of 'marijuana plants.' Nothing in the text of §2D1.1 or §841(b) suggests that their application depends upon whether the marijuana plants are harvested before or after authorities apprehend the grower."

"An interpretation of §2D1.1 that is not supported by the text of the guideline and depends on a state of affairs discovered by law enforcement authorities is contrary to the principle that guideline ranges are based on relevant conduct. *See* U.S.S.G. § 1B1.3. The guidelines broadly define 'relevant conduct,' which includes, among other things, '*all* acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction.' *Id.* (emphasis added). We hold that, where there is sufficient evidence that the relevant conduct for a defendant involves growing marijuana plants, the equivalency provision of §2D1.1 applies, and the offense level is calculated using the number of plants."

U.S. v. Shields, 87 F.3d 1194, 1195–97 (11th Cir. 1996) (en banc).

See *Outline* at II.B.2

En banc Tenth Circuit holds that full weight of methamphetamine "mixture" is used to calculate statutory minimum sentence. Defendant was originally sentenced to 188 months on the basis of the 32-kilogram weight of the methamphetamine mixture he produced. After §2D1.1, comment. (n.1), was amended in 1993 to exclude unusable materials from a drug "mixture or substance" for sentencing purposes, he was resentenced to 60 months based on the weight of the pure methamphetamine, 28 grams, that remained after excluding waste water. The government appealed, arguing that the amended guideline does not control drug weight for the purpose of calculating the mandatory minimum sentence under 21 U.S.C. § 841(b), and that defendant was subject to a ten-year minimum for possessing more than one kilogram of a "mixture or substance containing a detectable amount of methamphetamine." The appellate panel did not agree and affirmed the sentence. *U.S. v. Richards*, 67 F.3d 1531 (10th Cir. 1995) [8 *GSU* #3].

The en banc court reversed, holding that "the plain language of § 841(b)" and *Chapman v. U.S.*, 500 U.S. 453 (1991), requires using the weight of the mixture. In *Neal v. U.S.*, 116 S. Ct. 763 (1996) [8 *GSU* #4], "the Court reaffirmed that *Chapman* sets forth the governing definition of 'mixture or substance' for purposes of §841. In *Neal*, the Sentencing Commission amended the guidelines post-*Chapman* to revise the method of calculating the weight of LSD for purposes of sentencing under the guidelines. . . . The Court held that *Chapman*'s plain meaning interpretation of 'mixture or substance' governs the determination of a defendant's statutory mandatory minimum sentence under §841, even where the Sentencing Commission adopts a conflicting definition in the sentencing guidelines."

"Although the Court in *Chapman* specifically interpreted 'mixture or substance' in 21 U.S.C. §841(b)(1)(B)(v), its interpretation is not limited to that subsection. Under settled canons of statutory construction, we presume that identical terms in the same statute have the same meaning. . . . Accordingly, the plain meaning of 'mixture or substance' governs Defendant's mandatory minimum sentence calculation under §841(b)."

"Applying the plain meaning of 'mixture,' the methamphetamine and liquid by-products Defendant possessed constitute 'two substances blended together so

that the particles of one are diffused among the particles of the other.' . . . Liquid by-products containing methamphetamine therefore constitute a 'mixture or substance containing a detectable amount of methamphetamine' for purposes of §841(b)." The court rejected defendant's "invitation to define the statute in accord with the Sentencing Commission's amendment under a 'congruent' approach" or to follow cases which held that only "marketable" portions of a drug mixture should be used.

U.S. v. Richards, 87 F.3d 1152, 1156–57 (10th Cir. 1996) (en banc) (three judges dissented).

See *Outline* at II.B.1

Ninth Circuit holds that amended Note 12 of § 2D1.1 should be applied retroactively to set offense level by weight of drugs actually delivered, not larger amount negotiated. Defendants negotiated to sell five kilograms of cocaine to undercover FBI agents but actually delivered somewhat less. They were sentenced for the five kilograms they negotiated. On appeal, defendants argued they should have been sentenced for the amount actually delivered, which would reduce their offense levels by two. While the appeals were pending, Note 12 of § 2D1.1 was amended to specify that the offense level should be determined by the amount of drugs negotiated "unless the sale is completed and the actual amount delivered more accurately reflects the scale of the offense." The appellate court concluded that, under amended Note 12, the amount actually delivered here would be used: "[A]s the amount of cocaine actually present and under negotiation is determinable by the court and as no further delivery was contemplated . . . , the amount of cocaine actually seized (4,643 grams) more accurately reflects the scale of the offense than the promised five kilograms."

The court then held that the amendment should apply retroactively and remanded. "Amendments to Guidelines that occur between sentencing and appeal that clarify the Guidelines, rather than substantively change them, are given retroactive application. . . . The prior version of Application Note 12 was silent as to the amount of cocaine to be considered in a completed transaction. . . . In short, until Application Note 12 was amended, the appropriate weight of drugs to consider in a completed transaction was ambiguous; a court might sentence on the amount under negotiation or the amount delivered. Although this court twice addressed the proper interpretation of old version of Application Note 12, we never squarely answered the question of the appropriate weight to consider when sentencing a defendant for a completed transaction. . . . We therefore hold that by specifying the weight to consider in a completed transaction, the current version of Application Note 12 clarifies the Guidelines, and should be given retroactive effect."

U.S. v. Felix, 87 F.3d 1057, 1059–60 (9th Cir. 1996).

See *Outline* at II.B.4.a

Determining the Sentence

"Safety Valve" Provision

Ninth Circuit affirms safety valve reduction for defendant who, at trial and sentencing, denied earlier admissions. Defendant was arrested for importing heroin. In an interview after his arrest, defendant told federal agents what he knew of the importation scheme, including the identity of his supplier, and admitted that he knew he was carrying drugs. At his trial, however, defendant claimed that he had no knowledge of the drugs before their discovery by customs agents and thought he was merely returning a suitcase to a friend of the man he had earlier identified as the supplier. He stuck to that story in a presentence interview and at the sentencing hearing. The district court denied defendant a § 3E1.1 reduction for acceptance of responsibility but concluded that, despite his later denials, the information he provided to the government agents in the post-arrest interview qualified him for a safety valve reduction from the mandatory minimum, *see* 18 U.S.C. § 3553(f); USSG § 5C1.2.

The appellate court affirmed, rejecting the government's urging to analogize to § 3E1.1. "[W]e see no reason to require a defendant to meet the requirements for acceptance of responsibility in order to qualify for relief under the safety valve provision. . . . The safety valve statute is not concerned with sparing the government the trouble of preparing for and proceeding with trial, as is §3E1.1, or . . . with providing the government a means to reward a defendant for supplying useful information, as is §5K1.1. Rather, the safety valve was designed to allow the sentencing court to disregard the statutory minimum in sentencing first-time nonviolent drug offenders who played a minor role in the offense and who 'have made a good-faith effort to cooperate with the government.' . . . We hold that the district court did not clearly err in finding that Shrestha met the safety valve requirements. The fact that Shrestha denied his guilty knowledge at trial and at sentencing after his confession to the customs agents does not render him ineligible for the safety valve reduction as a matter of law. The safety valve provision authorizes district courts to grant relief to defendants who provide the Government with complete information by the time of the sentencing hearing. Shrestha's recantation does not diminish the information he earlier provided." *But cf. U.S. v. Long*, 77 F.3d 1060, 1062–63 (8th Cir. 1996) (affirming denial of §3553(f) reduction to defendant who lied to government about material fact in presentence interview and admitted it only on cross-examination during sentencing hearing) [8 *GSU* #6].

The court added that the initial burden of proof "is incontestably on the defendant to demonstrate by a preponderance of the evidence that he is eligible for the reduction. . . . Once he has made this showing, however, it falls to the Government to show that the information he

has supplied is untrue or incomplete. Apart from contending that Shrestha's denial of guilty knowledge at trial rendered him untruthful, which we have deemed irrelevant, the Government did not do so."

U.S. v. Shrestha, 86 F.3d 935, 939–40 (9th Cir. 1996). *See also U.S. v. Ramirez*, 94 F.3d 1095, 1100–01 (7th Cir. 1996) (affirmed: agreeing with other circuits that defendant "had the burden of proving, by a preponderance of the evidence, his entitlement to the reduction under §5C1.2").

See *Outline* generally at V.F and cases in 8 *GSU* #6

Departures

Mitigating Circumstances

Seventh Circuit holds that discovery of offense must objectively be unlikely to warrant §5K2.16 departure for voluntary disclosure. Section 5K2.16 states that if a defendant "voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted." Defendant here, vice president of a bank, voluntarily revealed that he had misapplied bank funds. Because defendant confessed out of remorse, not because he feared discovery, the district court departed from the guideline range of 18–24 months to impose a sentence of nine months. The government appealed, claiming the district court failed to make a necessary finding that discovery of the offense would have been unlikely absent defendant's disclosure.

The appellate court agreed and remanded, rejecting defendant's argument that the district court should make a subjective inquiry into *defendant's* belief as to the likelihood of discovery, rather than an objective inquiry into the actual likelihood of discovery. "[T]he guideline sets forth two requirements for a downward departure: (1) the defendant voluntarily disclosed the existence of, and accepted responsibility for, the offense prior to discovery of the offense; and (2) the offense was unlikely to have been discovered otherwise. . . . [A] downward departure is only awarded where the defendant is motivated by guilt and the Government receives information it likely would not have acquired absent the disclosure. The plain language yields this result, and we thus need not inquire further into the drafters' intent." Remand is required because the district court "did not make particularized findings regarding the likelihood of discovery."

U.S. v. Besler, 86 F.3d 745, 747–48 (7th Cir. 1996). *Cf. U.S. v. Brownstein*, 79 F.3d 121, 122–23 (9th Cir. 1996) (affirmed: "plain language" of §5K2.16 shows that it does not apply to bank robber who voluntarily notified police and confessed—offenses were already known to authorities even if identity of robber was not).

See *Outline* generally at VI.C.5

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